No. 90-1029

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EASTMAN KODAK COMPANY,
Petitioner,
v.
IMAGE TECHNICAL SERVICES, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF DIGITAL EQUIPMENT CORPORATION, ELSCINT, INC., GENERAL ELECTRIC COMPANY, HEWLETT-PACKARD COMPANY, INTECOM INC., PRIME COMPUTER, INC., UNISYS CORPORATION, AND WANG LABORATORIES INC. IN SUPPORT OF PETITIONER

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Dated: August 1, 1991

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INTEREST OF *AMICUS CURIAE*

Amici participate in the computer, telecommunications and medical equipment industries. Each sells products designed to meet users' needs and offers support (including post-sale service) for those products.[1]

The industries in which amici compete are characterized by stiff competition for system and equipment saies. Most amici are relatively small factors in their indus-

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[1] This brief is filed pursuant to Rule 37.2 of the Rules of this Court, accompanied by the written consent of all parties.

tries, and some are in declining positions. Firms in these industries cannot take advantage of users by lowering the quality or raising the price of any feature of their offerings, including replacement parts and service; any firm attempting to do so would quickly lose equipment sales and, indeed, place its entire equipment business at risk. Users and society have greatly benefited from intense interbrand systems competition in these and other high technology industries. *See generally* Brief *Amicus Curiae* of the Computer and Business Equip. Mfrs. Ass'n at 7-11 (Aug. 1, 1991) ("CBEMA Br.").

Users of computer, telecommunications and medical equipment and systems are highly sophisticated. They often make large purchases, and their purchase decisions are made only after careful, informed consideration. While the initial purchase price and the functionality of the system are relevant to their purchase decisions, so too is the total cost of ownership of the system over its entire life, a consideration implicating both the price and quality of post-sale service. Independent publications compare the total cost of ownership and the reliability of competing systems in these industries.

In light of this intense interbrand competition for system sales, numerous precedents reject attempts to label one or another participant in these industries as a "monopolist" in or as having "market power" over a "market" limited to its own offerings (or some part of them). Under these precedents, a firm's lack of market or monopoly power in the interbrand market in which it competes precludes both (a) replacement parts or service for its brand of equipment from being a relevant antitrust market and (b) a finding that it has market or monopoly power in any such alleged after-market. Numerous other precedents give vertically integrated manufacturers, large and small, the flexibility to make business decisions aimed at enhancing their overall interbrand competitiveness even though such decisions may injure intraband rivals. Under these precedents, even a monopolist has no duty to permit intrabrand rivals to free-ride on its investment in resources aimed at maximizing user satisfaction with its systems.[2]

The court below failed to apply these controlling precedents. The result, if allowed to stand, would permit a jury to find that petitioner Eastman Kodak Company ("Kodak") or any other integrated firm, including the smallest and weakest interbrand competitor, possesses market or even monopoly power over providing parts for and servicing its own brand of equipment, even while plainly lacking such power in the interbrand systems market. Such a result makes no economic or antitrust sense. This misapplication of sound market definition and market and monopoly power principles would materially impair competition by restraining the freedom of equipment vendors to innovate with regard to service and other product development efforts so as to enhance their overall interbrand competitiveness. Similarly, the decision below erroneously extends a manufacturer's duty to deal with intrabrand rivals to unprecedented limits, thereby chilling manufacturers from engaging in vigorous interbrand competition.[3]

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[2] Despite these precedents, several amici are now involved in litigation involving issues whether there is a relevant market limited to the service of a particular amicus' equipment, whether that amicus has market or monopoly power in such an alleged market, and whether that amicus' unilateral conduct (typically declining to cooperate in some way with other firms that service the amicus' systems) constitutes monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2, or unlawful tying under Section 1 of that Act, 15 U.S.C. § 1. *See* CBEMA Br. at 24-27. This case involves the same issues.

[3] While amici are concerned primarily with the legal and policy issues of general importance that this case presents, we note that the record in this case (as we understand it) is similar in many respects to the records or allegations in other pending cases involving one or another amicus. *See* Pet. App. at 42E-43E. Accordingly, while this brief focuses on the issues of general importance, it will also address the factual record of this case to the extent it bears on other cases.

In short, the effect of the decision below will be to discourage innovation and competition. To avoid this anticompetitive result, we urge the Court to reverse.

SUMMARY OF ARGUMENT

Kodak's conduct raises no legitimate antitrust concern. Respondents, 18 independent service organizations ("ISOs") that service Kodak photocopiers and micrographic equipment, contend that Kodak's policy not to sell replacement parts to ISOs' customers is an unlawful tying arrangement under Section 1 of the Sherman Act, and that its policy not to sell replacement parts to ISOs constitutes actual or attempted monopolization of an alleged market for service of Kodak equipment under Section 2 of that Act. However, respondents have never disputed, and the court below acknowledged, that Kodak lacks market or monopoly power in the interbrand markets for photocopier and micrographic equipment (i.e., systems) sales. This undisputed fact is fatal to respondents' case because it precludes the existence of a triable issue whether Kodak has market or monopoly power in any properly defined market.

A. The court below erred in defining the relevant markets. It held that the relevant market for the Section 2 claim could be limited to service for Kodak equipment. However, most courts, relying on this Court's decision in *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956)—which held that the relevant market must include all reasonably interchangeable substitutes for defendant's offering and thus all constraints on defendant's conduct—have rejected market definitions limited to one manufacturer's product or to service therefor. These courts have recognized that interbrand systems competition gives consumers reasonably interchangeable substitutes.

Similarly, for purposes of the tying claim, the holding below that Kodak replacement parts and service can be

deemed separate product markets, distinct from each other and from Kodak equipment itself, is erroneous because there is no demand for such parts or service except for use in conjunction with the equipment. No consumer would ever purchase Kodak parts or service unless it had already purchased Kodak equipment. There can be no relevant markets limited to replacement parts or service for one manufacturer's systems, and such parts and service cannot be considered two separate product markets for purposes of tying analysis.

B. Kodak's undisputed lack of interbrand market power over systems also precludes it from exercising market power (the power to coerce customers) or monopoly power (the power to raise prices or exclude competition) in the alleged parts and service after-markets. Any attempt to do so would be self-destructive, since the resulting price increase would cost Kodak far more in lost systems sales to prospective new users and to existing users replacing or adding to their existing equipment than it could hope to gain in increased parts or service revenues.

The court below recognized this logic but nevertheless reversed summary judgment for Kodak on the ground that there might be some unspecified "market imperfections" insulating Kodak's parts and service practices from the forces of interbrand competition. That approach disregards this Court's settled standards for granting summary judgment in antitrust cases, particularly as specified in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The effect of the decision below would be to eliminate summary judgment in tying and monopolization cases: any antitrust plaintiff will claim that there might be some unspecified "market imperfection" necessitating a trial. This Court has made clear that summary judgment is required unless there is significant probative evidence in the record that raises a genuine issue of material fact for trial. The speculation of the court below about what market imperfections

might exist outside the record plainly fails to meet that standard.

The court's observations that Kodak once charged more than ISOs for service, that some Kodak equipment owners will pay such higher prices rather than switch to competitors' equipment, and that Kodak parts are unique also fail to raise a triable issue:

1. That Kodak once charged more than ISOs does not mean it could sustain those prices long enough to permit an inference of market power. Interbrand systems competition precludes a manufacturer from exercising market power over replacement parts or service for any economically meaningful length of time. Buyers generally are willing to pay more for brand-name products than for generic substitutes, but that fact alone cannot give brand-name vendors market power in any sense relevant to antitrust concerns.

2. That some Kodak owners would accept higher service prices rather than switch to competitive equipment is also irrelevant. Buyers take steps to avoid exploitation when they purchase equipment and sellers have no rational incentive to risk losing future equipment sales by raising service prices to existing users. The proper point at which to measure the seller's market power is before, not after, the user has made its equipment purchase decision.

3. The alleged uniqueness of Kodak parts does not give Kodak any advantage over interbrand competitors, and therefore also cannot support an inference of market power.

C. Finally, the court below incorrectly held that Kodak has a legal duty to provide parts to ISOs unless it proffers justifications that a trier of fact finds to be "genuine" rather than "pretextual." This holding dramatically expands the circumstances under which an alleged monopolist may or should be forced to assist its

competitors. It is particularly anomalous in light of respondents' admissions and claims that, despite Kodak's allegedly restrictive parts practices, (a) the number of ISOs and the volume of their businesses have grown dramatically over the past 10 years; (b) many ISOs maintain inventories of Kodak parts substantially greater than Kodak's; and (c) ISOs provide superior service to Kodak. The court's preoccupation with whether Kodak's justifications are "genuine" or "pretextual" and the result of its holding—permitting a jury to find treble-damage liability on this kind of record—threatens to chill wholly legitimate, procompetitive actions. The decision below should be reversed.

ARGUMENT

I. THE COURT BELOW INCORRECTLY HELD THAT THERE COULD BE RELEVANT MARKETS FOR KODAK REPLACEMENT PARTS AND SERVICE OF KODAK EQUIPMENT

The court below held that there were triable issues whether Kodak has market power over a "market" for Kodak-brand replacement parts (for purposes of the Section 1 claim) and monopoly power over a "market" for service of Kodak systems (for purposes of the Section 2 claim). These holdings raise issues of fundamental importance at the heart of numerous cases pending against firms in several high technology industries and directly affecting the ability of *all* firms in these industries to innovate and compete. *See* CBEMA Br. at 24-27. These holdings are incorrect and should be reversed.[4]

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[4] Kodak properly raised the market definition issue in its summary judgment motion. *See* Memorandum . . . in Support of Defendant's Motion for Summary Judgment at 32-34, *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, No. C 87 1686 WWS (N.D. Cal. Aug. 14, 1987).

Market definition and market/monopoly power issues are closely intertwined. Market and monopoly power are economic concepts that are generally proved through surrogate facts, usually market share data. Before determining whether a firm has market or monopoly power, the market in which to make that determination must be *correctly* defined. Antitrust plaintiffs typically urge the narrowest imaginable product market, for the narrower that market, the larger defendant's share thereof. Many plaintiffs go so far as to define the market as defendant's own brand, or even more narrowly and artificially as goods (such as replacement parts) or service associated with that brand. In this manner, defendant would likely have a high "market share" in the purported "relevant market."

This approach does not promote competition. To the contrary, it ingores the choices that are in fact available to consumers. Thus, in *duPont*, the Court stated that control of 75% of the cellophane "market" would have constituted monopoly power *if* the market had been so defined, but held that defendant did not have monopoly power because the correctly defined market consisted of *all* flexible wrapping materials, not merely cellophane. 351 U.S. at 404. The Court added (*id.* at 393):

> [O]ne can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for tht product.

The "competitive market" must take account of all constraints on a firm's ability to raise price or limit output, and specifically must include all reasonably interchangeable substitutes for the products in question and

all suppliers that could readily assign productive capacity if given proper incentive to do so. *Id.* at 389-94. *See also Brown Shoe Co. v. United States*, 370 U.S. 284, 325 (1962); *United States v. Columbia Steel Co.*, 334 U.S. 495, 510-11 (1948). Thus, all firms and products whose presence constrains defendant's behavior must be included in the relevant market.

Following *duPont*, most lower courts have refused to define markets limited to a single manufacturer's products or a single brand, in cases involving the computer, medical equipment and other industries.[5] Similarly, most lower courts have rejected market definitions limited to

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[5] *International Logistics Group, Ltd. v. Chrysler Corp.*, 884 F.2d 904, 908 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1783 (1990); *H.L. Hayden Co. v. Siemens Medical Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989); *H.J., Inc. v. International Tel. & Tel. Corp.*, 867 F.2d 1531, 1538 (8th Cir. 1989); *Key Fin. Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 643 (10th Cir. 1987); *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 675 (6th Cir. 1986); *Seidenstein v. National Medical Enters., Inc.*, 769 F.2d 1100, 1106 (5th Cir. 1985); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 (5th Cir. 1984); *Transource Int'l, Inc. v. Trinity Indus., Inc.*, 725 F.2d 274, 282-83 (5th Cir. 1984); *General Business Sys. v. North Am. Philips Corp.*, 699 F.2d 965, 972-75 (9th Cir. 1983); *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*, 691 F.2d 241, 244 (6th Cir. 1982); *Parsons v. Ford Motor Co.*, 669 F.2d 308, 312 (5th Cir.), *cert. denied*, 459 U.S. 832 (1982); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 117-18 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 242 (5th Cir. 1978); *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 919 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); *ALW, Inc. v. United Air Lines*, 510 F.2d 52, 56 (9th Cir. 1975); *Mullis v. ARCO Petroleum Corp.*, 502 F.2d 290, 296 (7th Cir. 1974); *Allen-Myland, Inc. v. IBM Corp.*, 693 F. Supp. 262, 272-79 (E.D. Pa. 1988); *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965, 985 (N.D. Cal. 1979), *aff'd sub nom. Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 429 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

replacement parts or service for one manufacturer's equipment. In *International Logistics Group*, for example, Chrysler cut off plaintiff's access to Chrysler replacement parts because plaintiff had been selling them at prices lower than Chrysler's. The Sixth Circuit rejected plaintiff's claim that this action was an unlawful attempt to monopolize an alleged market for "the resale of Chrysler manufactured replacement automotive parts to Chrysler franchised dealers" because "[m]onopolization of a single brand is not an antitrust violation." 884 F.2d at 905, 908. *See also Dunn & Mavis*, 691 F.2d at 243, 244.[6]

In *Bushie v. Stenocord Corp.*, 460 F.2d 116, 121 (9th Cir. 1972), the Ninth Circuit affirmed summary judgment against a complaint alleging a relevant market limited to servicing Stenocord equipment because there was no evidence "that Stenocord dominated the market for office dictating machines generally, or that it controlled a major share of the market for machines of its particular type." And in *Spectrofuge Corp. v. Beckman Instrs., Inc.*, 575 F.2d 256, 278-86 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979), the Fifth Circuit rejected a market limited to servicing Beckman scientific instruments because service was an integral part of the market for equipment sales.

These cases correctly reject market definitions limited to one manufacturer's product (or associated goods or services) when interbrand competition prevents the exercise of market power over any alleged intrabrand aftermarkets. Where effective interbrand competition exists, a manufacturer cannot profitably impose any anticompetitive intrabrand restraint over either parts or service. Any attempt to do so would cost the manufacturer far more in lost systems sales than it could hope to gain in

[6] These same principles apply to definition of the tying product market for Section 1 purposes. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26-27 (1984); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 796-97 (1st Cir. 1988).

additional parts or service profits. Thus, under the *duPont* framework, interbrand competition provides consumers with reasonable alternatives, and precludes a market definition limited to replacement parts or service for one manufacturer's equipment.

On the Section 1 claim, the court below held that there was a triable issue whether parts and service for Kodak equipment were distinct product markets. Pet. App. at 6A-7A. This holding overlooks the economic reality that demand for Kodak parts and service cannot be separated from demand for Kodak equipment: no consumer would ever purchase Kodak's parts or service if it did not already have Kodak's equipment. Thus, Kodak parts and service are not distinct either from Kodak equipment or from each other and, therefore, a necessary element of the tying offense—two distinct product markets—is not met. *Jefferson Parish*, 466 U.S. at 21 ("a tying arrangement cannot exist unless two separate product markets have been linked"). As Justice O'Connor explained in her concurrence on behalf of four Justices in *Jefferson Parish*, *id.* at 39 (emphasis in original),

> [f]or products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product*. When the tied product has no use other than in conjunction with the tying product, a seller of the tying product can acquire no *additional* market power by selling the two products together.

This case illustrates the importance of applying that minimum criterion. Because consumers have "no use" for Kodak parts or service except "in conjunction with" Kodak equipment, there is no economically rational basis to define markets for "Kodak parts" or "service for Kodak equipment" separate from the market for Kodak equipment. Since Kodak's conduct thus does not involve two distinct product markets, the concerns underlying

the tying prohibition do not arise. *See id.* at 14-15. There is accordingly no need to inquire into Kodak's power in the alleged parts market or, for that matter, in the equipment market.[7]

On the Section 2 claim, the court below addressed market definition only in passing. It stated simply that "[t]his court has strongly suggested that service of one company's micrographic equipment can be a relevant market under Section 2," relying on *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480-81 n.3 (9th Cir. 1986), *modified*, 810 F.2d 1517 (9th Cir. 1987). Pet. App. at 18A. *Dimidowich* does not support that proposition. The Ninth Circuit there intimated that service of a product and the product itself may be viewed separately *only* for purposes of determining in a Section 1 conspiracy case whether two firms competed with each other and thus whether their alleged concerted refusal to deal was a horizontal or vertical restraint. The court was not called on and did not purport to engage in the market analysis required in tying and monopolization cases.

Respondents cited below only two other cases that they contend support the proposition that the relevant market may be limited to one manufacturer's products: *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978), and *C.E. Servs., Inc. v. Control Data Corp.*, 759 F.2d 1241 (5th Cir.), *cert. denied*, 474 U.S. 1037 (1985). Neither case supports their position.

[7] Concurring on behalf of four Justices in *Jefferson Parish*, Justice O'Connor persuasively argued that tying claims should be analyzed under the rule of reason rather than being treated as illegal per se. 466 U.S. at 33-42. Indeed, as Justice O'Connor noted, only in "rare" circumstances will tying be "economically harmful." *Id.* at 36-37 & n.4. *See* R. Bork, *The Antitrust Paradox* 365-81 (1978). Since respondents limited their Section 1 claim to an assertion of per se illegal tying, this case presents the Court with an opportunity to consider Justice O'Connor's argument, which amici support, that per se treatment of tying claims is inconsistent with this Court's antitrust jurisprudence.

In *Heatransfer*, the Fifth Circuit upheld a jury finding of a relevant market limited to air conditioners for Volkswagen products. The court deemed it appropriate to separate air conditioners from cars because an air conditioner was not an indispensable component of a car. 553 F.2d at 980. One year later, the Fifth Circuit expressly rejected a market definition limited to servicing Beckman scientific instruments because service *was* an integral part of the equipment. *Spectrofuge*, 575 F.2d at 278-86. In this case (as in the other pending cases involving similar market definition issues), the peculiar facts of *Heatransfer* are not present. Indeed, it is undisputed that replacement parts and service are critical elements of both system performance and the customer's decision which system to buy.

In *C.E. Services*, plaintiff, an ISO, asserted that the market consisted of all ISOs servicing IBM computers. Defendant, another ISO, agreed for purposes of summary judgment that the market should be limited to service of IBM computers, but argued that IBM should also be included in that market. Neither party addressed the impact of interbrand competition on market definition, and the Fifth Circuit did not consider or decide the issue. When the Fifth Circuit has considered that issue, it has held that the existence of interbrand competition forecloses a market definition limited to a single firm's offerings. *See* cases cited *supra* at 9-10 & n.5.[8]

In sum, it makes no antitrust or economic sense to define a market as one competitor's products or as replacement parts or service for those products. To do so improperly "makes every maker of unique parts for its own

[8] In *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712 (7th Cir. 1987), *appeal after remand*, 866 F.2d 228 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 141 (1989), the court, over Judge Posner's dissent, accepted a tying product market limited to parts for defendant's brand of electric motors. But defendant had waived any argument for defining the market at the interbrand level. 826 F.2d at 717-18; 866 F.2d at 230.

product a holder of market power no matter how unimportant its product might be in the market." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 525.1b at 530 (1990 Supp.) ("Areeda & Hovenkamp").

II. THE COURT BELOW INCORRECTLY HELD THAT KODAK COULD HAVE MARKET OR MONOPOLY POWER OVER ITS PARTS AND SERVICE

Respondents have never disputed that Kodak lacks market or monopoly power in the interbrand equipment markets. The court below recognized the "logical appeal" in Kodak's argument that it could not have market or monopoly power in the alleged parts and service after-markets if it lacks such power in the interbrand systems markets. Pet. App. at 8A n.3, 19A.[9] The case should have ended there, for there can be no antitrust violation without interbrand market power.[10]

Nevertheless, the court held that there was a triable issue whether Kodak has market power over parts and monopoly power over service because of the novel premise that "market imperfections can keep economic theories about how consumers will act from mirroring reality." *Id.* at 10A. It added that, while respondents had "not

[9] Specifically, the court correctly observed that "competition in the interbrand markets might prevent Kodak from possessing power in the parts market" and that

> just as equipment purchasers would turn to one of Kodak's competitors if Kodak tied supercompetitively priced parts or service directly to equipment, equipment purchasers might turn to one of Kodak's competitors if Kodak ties supercompetitively priced service to parts. Kodak's desire to attract new customers might, therefore, keep it from charging supercompetitive prices for service.

Pet. App. at 8A, 9A.

[10] Whatever the distinction between Section 1 market power and Section 2 monopoly power may be, that distinction cannot obscure the fact that some form of economic power is the focus of antitrust law.

conducted a market analysis and pin-pointed specific imperfections in the copier and micrographic markets, a requirement that they do so in order to withstand summary judgment would elevate theory above reality." *Id.*

The court also cited alleged "evidence of actual events from which a reasonable trier of fact could conclude that Kodak has power in the interbrand market and that competition in the interbrand market does not, in reality, curb Kodak's power in the parts market": (a) Kodak once charged "up to twice as much as [respondents] for service that [was] of lower quality"; (b) competition "drove down the price that Kodak was willing to charge"; (c) "some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems"; (d) Kodak parts "are unique and available only from Kodak"; and (e) Kodak's share of the interbrand equipment markets may approach as much as 23%. Pet. App. at 10A-12A. Such evidence, even if it were to exist,[11] would fail to raise a triable issue.

A. The Existence of Interbrand Competition Precludes the Exercise of Intrabrand Market or Monopoly Power

The decision below that Kodak's undisputed lack of market power in the interbrand equipment markets did not necessarily prevent it from having market power in the alleged parts and service after-markets (Pet. App. at 10A-12A) is wrong. Kodak's lack of interbrand market power precludes it as a matter of sound law and

[11] The sources of the evidence on which the court below relied were the declarations of officials of various respondents, principally the declaration of Paul Hernandez, president of Image Technical Services. We understand that this evidence consists in its entirety of multiple hearsay statements that would not be admissible under Fed. R. Evid. 802-804. Such evidence fails to create a triable issue, because a party opposing summary judgment must "set forth such facts as would be admissible in evidence." Fed. R. Civ. P. 56(e).

economics from possessing such power in any alleged after-market. Any attempt to charge supra-competitive prices in an alleged after-market would be unprofitable because the resulting price increase would cost Kodak far more in lost equipment sales than it could hope to gain in increased parts or service revenues. Thus, lack of interbrand market power precludes any possibility of anticompetitive effect in the hypothetical parts and service after-markets.

In dealer termination and other cases involving intrabrand territorial or customer restrains imposed on dealers, this Court has long recognized that interbrand, not intrabrand, competition is the antitrust law's "primary concern." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724-26 (1988).[12] "[S]o long as interbrand competition existed, that would provide a 'significant check' on any attempt to exploit intrabrand market power." *Business Elecs.*, 485 U.S. at 725 (quoting *Sylvania*, 433 U.S. at 52 n.19). Following *Sylvania*, the lower courts have uniformly required a showing of *interbrand* market power as a prerequisite for liability in such cases. VIII P. Areeda, *Antitrust Law* ¶ 1645 at 480-81 & n.15 (1989). The rationale for this rule was set forth in *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 316 (8th Cir. 1986):

> Firms lacking [interbrand] market power, if they wish to survive, cannot adopt restraints that have anticompetitive effects. Thus such firms cannot have an effect on interbrand competition. Consequently, a finding of no [interbrand] market power precludes any need to further balance the competitive effects of a challenged restraint.

[12] In *Sylvania*, 433 U.S. at 54, the Court held that the rule of reason, not the per se rule, should apply to vertical nonprice restraints because such intrabrand restraints "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."

See also Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982).

This sound approach of focusing on interbrand rather than intrabrand competition should be followed in this and the other pending cases involving similar issues (*see* Pet. App. at 42E-43E). However, under the decision below, interbrand competition will effectively be subordinated to intrabrand competition. That decision makes no economic or antitrust sense and should be reversed.

B. The Reliance of the Court Below on Unspecified "Market Imperfections" Disregards This Court's Settled Law for Granting Summary Judgment in Antitrust Cases

The decision below that unspecified "market imperfections" are sufficient to create a triable issue regarding market and monopoly power would eliminate summary judgment in a large class of antitrust cases. Under the decision below, no tying or monopolization case could be disposed of until inquiry into hypothetical market imperfections—whose breadth would be limited only by the imagination of the parties' economists—had been completed. The result would lead to extremes of speculation neither contemplated by the authors of Fed. R. Civ. P. 56 nor allowed under this Court's decisions.

The court below misapplied controlling standards for granting summary judgment in antitrust cases. Its reliance on unspecified "market imperfections" ignores this Court's holding that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis by the Court). To show such an issue in an antitrust case, a plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts," and "if the factual

context renders [plaintiffs'] claim implausible—if the claim is one that simply makes no economic sense—[plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matshushita*, 475 U.S. at 586-87. In addition, once the moving party has identified those portions of the record that it believes demonstrate the absence of a triable issue, the non-moving party must then come forward with "specific facts showing there is a genuine issue for trial." *Id.* at 587.

In *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987), then-Judge Kennedy elaborated:

> It is the record made on summary judgment that controls, not that record plus speculative inferences a trier of fact might add: and the only inferences permitted from the summary judgment record itself are those that are reasonable given the substantive law which is the foundation for the claim or defense. Where a party asserts there is a genuine issue for trial . . . its argument is measured by the underlying theory of the claim or defense being considered. . . . [T]he substantive law is the law of antitrust, and if the claim makes no economic sense, a speculative inference from the jury will not help it. In such an instance, the record on summary judgment must contain further persuasive evidence if it is to support the claim.

The decision below is contrary to these settled principles. The court expressly recognized the logic that interbrand competition precludes market or monopoly power over parts or service, thus necessarily recognizing the *illogic* of respondents' claim that Kodak has such power. Far from requiring respondents to provide more persuasive or even significant probative evidence to support their claim, however, the court simply speculated that "market imperfections" may be present. It did not identify those "imperfections" or impose on respondents the burden of doing so because, in its view, that would

somehow "elevate theory above reality." Pet. App. at 10A.

But *Matshushita* imposes just such a burden and requires antitrust plaintiffs to present "more persuasive" *evidence* in opposition to a summary judgment motion where, as here, the claim makes no economic sense. More basically, it precludes denial of summary judgment on the basis of speculative inferences such as the unidentified "market imperfections" cited below. Summary judgment is especially important in antitrust cases because "antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work," and "the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation." *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). Accordingly, the decision below should be reversed.[13]

C. The "Actual Events" Relied on by the Court Below Do Not Create a Triable Issue as to Kodak's Market Power

The alleged evidence of actual events referred to by the court below (*see supra* at 15) fails to create a triable issue.

1. The possibility that Kodak once charged more than ISOs for service could be suggestive of market power only "under proper circumstances." *General Business Sys.*, 699 F.2d at 977.[14] No such circumstance exists

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[13] Respondents' complaint that the district court improperly denied their Fed. R. Civ. P. 56(f) motion for additional discovery prior to ruling on Kodak's summary judgment motion is unfounded. No such additional discovery could have yielded evidence sufficient to create a triable issue where respondents did not dispute Kodak's lack of interbrand market power.

[14] One circumstance that is not only proper but *essential* to any inference of market power is a showing of significant entry barriers. Absent such barriers, the mere fact that Kodak might have been

here. Respondents presented no evidence supporting their assertion that Kodak's higher prices resulted from the existence or exercise of market power.

Evidence that Kodak charged higher service prices at one time does not mean that it could sustain those prices long enough to permit a reasonable inference of market power. *See Syufy*, 903 F.2d at 665-66; *American Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1320-21 (7th Cir. 1991).[15] The court below found that competition "drove down the price that Kodak was willing to charge for service" (Pet. App. at 11A), thus confirming that Kodak lacks the power to sustain higher prices.[16] The fundamental, dispositive fact here is that interbrand systems competition wholly forecloses Kodak from maintaining higher prices; any attempt to do so would only "hasten[] the date on which [Kodak] surrender[s] to its competitors" in the equipment market. *General Business Sys.*, 699 F.2d at 977. *See also Sylvania*, 433 U.S. at 55 ("[t]he availability and quality

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charging higher prices at some point in time cannot suffice to create a genuine issue as to its market power. *Matsushita*, 475 U.S. at 591 n.15 ("without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time"); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 987 (D.C. Cir. 1990) (Thomas, J.) ("[i]n the absence of significant [entry] barriers, a company probably cannot maintain supra-competitive pricing for any length of time"); *United States v. Syufy Enters.*, 903 F.2d 659, 664 (9th Cir. 1990) ("any attempt to raise prices above the competitive level will lure into the market new competitors able and willing to offer their commercial goods or personal services for less"). We are unaware of any record evidence of entry barriers allowing Kodak to *maintain* higher prices.

[15] This Court has made clear that market definition and market power issues should be considered in terms of "long run," not "immediate," responses. *United States v. Continental Can Co.*, 378 U.S. 441, 455 (1964).

[16] Contrary to the holding of the court below, this evidence, far from permitting a reasonable inference of Kodak's economic power, shows that Kodak lacks market power.

of [service and repair] affect a manufacturer's goodwill and the competitiveness of his product").

Moreover, evidence that Kodak charged more than ISOs would "be entirely consistent with a marketing strategy of spreading the cost of equipment more evenly over its life by charging a lower initial purchase price and higher service fees." Brief for the United States as Amicus Curiae [in support of the petition for certiorari] at 11 (May 1991). Conduct as consistent with lawful as with unlawful competition does not, standing alone, create a triable issue. *Matsushita*, 475 U.S. at 588. Such evidence would also be entirely consistent with the business reality that many buyers are willing to pay more for brand-name offerings than for generic substitutes. That reality cannot bestow market power where there is effective interbrand competition; if it did, even the smallest and weakest brand-name competitor could thereby incorrectly be deemed to have market power.

2. The court below held that an inference of market power could be supported by "evidence" that some Kodak equipment owners would pay higher service prices rather than switch to competitors' equipment. Pet. App. at 11A. Similarly, respondents have asserted that some existing Kodak equipment owners are "locked in" to replacement parts and service for their equipment and could not readily switch to competing brands of equipment. Both this "evidence" and, more generally, the lock-in notion fail to create a triable issue.

The lock-in notion is untenable as a matter of law. The lower courts have repeatedly and correctly rejected it as a basis for finding market or monopoly power.[17] This Court should now do the same. The only case even arguably supporting the lock-in notion is *Digidyne Corp. v.*

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[17] *General Business Sys.*, 699 F.2d at 975; *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 293-95 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980); *Telex*, 510 F.2d at 917; *ILC Peripherals*, 458 F. Supp. at 429.

Data General Corp., 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985). There, however, the Ninth Circuit did not find that an alleged lock-in gave defendant market power. It simply observed that lock-in "enhanced" economic power that the court had already found from the existence of a copyright. *Id.* at 1341-43. *Digidyne* has been roundly criticized by other courts of appeals, and the Ninth Circuit itself has declined to apply it.[18]

The lock-in notion is also contrary to sound economics. It ignores the realities that buyers can and do protect themselves from exploitation by the seller and that sellers risk the loss of future equipment sales to both new and existing users if they exploit their allegedly locked-in customers. Thus, the proper point at which to evaluate whether a seller has economic power over the buyer is before, not after, the user has purchased the seller's, rather than someone else's, equipment.

Antitrust law is concerned with the predictable harm that an unrestrained monopolist is likely to cause, not with the kind of harm an irrational firm could cause. Focusing on an existing user's possible vulnerability to increased service prices is pointless unless the seller could increase service prices without destroying its market position. Here, as in the many other pending cases involving the same issue, the manufacturer cannot raise parts or service prices to existing users without jeopardizing far greater future equipment sales. The fear of a lock-in effect is misplaced where the manufacturer lacks market power in the interbrand market.

3. The court below observed that "many Kodak parts . . . are unique and available only from Kodak." Pet. App. at 11A.[19] The alleged "uniqueness" of a manufacturer's parts, however, does not give the manufacturer market or monopoly power.

> A common misconception has been that a patent or copyright, a high market share, or a unique product that competitors are not able to offer suffices to demonstrate market power. While each of these three factors might help to give market power to a seller, it is also possible that a seller in these situations will have no market power: for example, a patent holder has no market power in any relevant sense if there are close substitutes for the patented product. Similarly, a high market share indicates market power only if the market is properly defined to include all reasonable substitutes for the product.

Jefferson Parish, 466 U.S. at 37-38 n.7 (O'Connor, J., concurring). The Court has made clear that a product's uniqueness will not confer market power unless it gives defendant some advantage over its *interbrand* competitors. *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 622 (1977) ("[w]ithout any evidence that the Credit Corp. had some cost advantage over its competitors—or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected—the unique character of its financing does not support the conclusion that petitioners had the kind of economic power which Fortner had the burden of proving").

The uniqueness of a manufacturer's products or parts does not bestow market power if there is effective interbrand competition. Such competition prevents the manufacturer from exploiting the uniqueness of its products in an anticompetitive manner. Where, as here, the fact of

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[18] *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1346 n.4 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988); *A.I. Root*, 806 F.2d at 677; *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 n.4 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986).

[19] That observation appears incorrect as a factual matter. Respondents admit that "many ISOs have inventories of Kodak parts substantially greater than Kodak's." Brief of Appellant at 15, *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, No. 88-2686 (9th Cir. Oct. 10, 1988) ("Respondents' C.A. Br.").

interbrand competition is undisputed, the uniqueness of a manufacturer's parts cannot give it market power.

4. Finally, given Kodak's undisputed lack of interbrand market power, its percentage share of the interbrand markets—whether 23% or 80%—is irrelevant. Moreover, it is settled that a 30% market share, even combined with evidence of actual market imperfections, is insufficient to support a finding of market (let alone monopoly) power. *Jefferson Parish*, 466 U.S. at 26-27. *See also Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611-13 (1953) (33%-40% share insufficient to meet market power requirement of tying offense); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 n.15 (1986) (20.4%-28.4% share suggests insufficient market power to engage in predatory pricing).

III. THE COURT BELOW INCORRECTLY HELD THAT KODAK HAS A LEGAL DUTY TO PROVIDE REPLACEMENT PARTS TO ISOs

The court below purported to recognize the rule that a monopolist has no general duty to deal with its competitors.[20] It nonetheless stated that a "monopolist may not refuse to deal with a competitor in an exclusionary attempt to impede competition without a legitimate business reason" and that "a monopolist may not retaliate against a customer who is also a competitor by denying him access to a facility essential to his operations, absent

[20] "The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors." *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 116 (1975). Thus, "even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor. . . . The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and his associates." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600-01 (1985).

legitimate business justifications." Pet. App. at 16A-17A. It then held that (a) there was a triable issue whether Kodak's first two justifications of promoting interbrand competition and reducing inventories (*see* Pet. at 5-6) were "genuine rather than pretextual"; and (b) Kodak's third justification of preventing freeriding by ISOs (*see id.* at 6) was illegitimate as a matter of law. Pet. App. at 17A-18A.

The decision below conflates two entirely separate questions, namely, whether Kodak had a legal duty *ab initio* to cooperate with respondents and whether, assuming it had such a duty, it was nevertheless excused from that duty by virtue of a legitimate business justification. By so confusing the issues, the decision below effectively transforms the rule that a monopolist has no general duty to cooperate with its competitors into a rule that it does have such a duty unless (and only unless) it can prove its business justification.[21]

That is not and cannot be the law. While this Court has never clearly articulated the circumstances under which a firm is legally bound to deal with its rivals, it has surely not held that a firm—even one possessing monopoly power—has a general duty to deal absent a legitimate business justification. If any duty to deal should ever be imposed, it should be exceedingly narrow, and its restricted application should be clearly defined. P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 852-53 (1990). *See also Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987). Of dispositive significance

[21] The court below purported to recognize that a Section 2 plaintiff bears the burden of proving lack of business justification. Pet. App. at 17A n.9. But it rejected Kodak's proffered justifications on the basis of speculative inferences, not on the basis of significant probative evidence showing that those justifications did not exist or were not legitimate.

here, "[i]t may be presumed that requiring a vertically integrated monopolist to deal with would-be competitors does not have [a procompetitive] effect." Areeda & Hovenkamp ¶ 736.2a at 762. This is because the alleged monopolist in the vertically integrated after-market (e.g., for parts or service) "is not a monopolist in a realistically defined market" and "does not possess power over market output or price"; therefore, "allowing access to his facilities would not reduce a market power that does not exist." *Id.* ¶ 736.2d at 771.

The court below erred in finding a triable issue whether Kodak's inventory of parts is an "essential facility." While Kodak has for several years followed a policy of not providing replacement parts to ISOs or customers using ISOs, respondents admit that "[t]he number of ISOs and the volume of their business has grown dramatically over the past ten years." Respondents' C.A. Br. at 2. Respondents further admit that "many ISOs have inventories of Kodak parts substantially greater than Kodak's," that 90% of Kodak's parts are not made by Kodak, and that they are able to obtain parts from other sources. *Id.* at 15. And respondents "presented evidence that their service is superior to Kodak service." Pet. App. at 13A. Under these circumstances—all occurring without access by ISOs to Kodak's parts—such access cannot be deemed an essential facility.

The court below further erred in focusing on the intent behind Kodak's parts policies (specifically on whether Kodak's proffered justifications were "genuine" or "pretextual"). Making antitrust liability hinge on such intent evidence would chill perfectly lawful conduct that the antitrust laws are intended to promote. Legitimate, procompetitive business practices are by definition designed to take business away from rivals:

> Most businessmen don't like their competitors, or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run.

Olympia, 797 F.2d at 379. Thus, "if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant." *Id.*

Using intent as the barometer of anticompetitive conduct wrongly shifts the focus from the actual effects on consumers to a necessarily subjective analysis of defendant's state of mind. But "the nature and consequences of a particular practice are the vital consideration, not the purpose or intent." III P. Areeda & D. Turner, *Antitrust Law* ¶ 626a at 76 (1978). The approach of the court below would deter firms alleged to have market or monopoly power from engaging in legitimate, procompetitive practices by threatening them with treble-damage antitrust liability. *A.A. Poultry Farms, Inc. v. Rose Acres Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1326 (1990).[22]

Finally, the court below erred by holding that Kodak's desire to prevent freeriding by ISOs is illegitimate as a matter of law. *See* Pet. App. at 14A-15A. This Court has often recognized that it is perfectly legitimate and competitively desirable for businesses to take steps to eliminate freeriding. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762-63 (1984); *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 222 (1980); *Sylvania*, 433 U.S. at 55. *See also Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 930 (4th Cir. 1990); *Olympia*, 797 F.2d at 377. Thus, Kodak's undisputed desire to

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[22] *A.A. Poultry* also explains why these issues should be resolved at the summary judgment stage: "Traipsing through the warehouses of business in search of misleading evidence both increases the costs of litigation and reduces the accuracy of decisions. Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation." 881 F.2d at 1402.

prevent freeriding should be sufficient as a matter of law to insulate it from antitrust liability.

In short, even a monopolist (assuming the existence of monopoly power) "has the same right to compete as any other company. Under the antitrust laws, a monopolist is encouraged to compete vigorously with its competitors and to remain responsive to the needs and demands of its customers." *United States Football League v. National Football League*, 842 F.2d 1335, 1360-61 (2d Cir. 1988) (approving jury instructions). The decision below improperly deters brand-name manufacturers from engaging in vigorous competition by exposing them to second-guessing of their business decisions by juries, and to the attendant possibility of treble-damage liability if a jury does not like those decisions. It should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case should be remanded with instructions to reinstate the district court's entry of summary judgment for Kodak.

Respectfully submitted,

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Dated: August 1, 1991